IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.612 OF 2003

Umesh Govind Shelar]
@ Palkar, C-12985]
At present in Yerawada]
Central Prison, Pune-411006]..Appellant

Vs.

1) The State of Maharashtra]
At the instance of Antop]
Hill Police Station]
]
2. Kamal Narayan Linganchapa]..Respondents

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Mr.Murtaza M. Najmi Advocate (appointed) for Appellant
Mr.A.S.Shitole, A.P.P. for State

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CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : FEBRUARY 21, 2007

ORAL JUDGEMENT:

1. Heard Mr.Murtaza M. Najmi, the learned advocate (amicus curiae) appointed for the appellant and Mr.A.S.Shitole, the learned A.P.P. for the State.

2. Through this appeal, the original accused has challenged the judgment and order dated 4.7.2002 passed by the learned Additional Sessions Judge,

Gr.Bombay in Sessions Case No. 507 of 2001. By the said judgment and order, the learned Sessions Judge convicted the appellant under Sections 376 and 506 of IPC. The appellant has been sentenced to R.I. for seven years and to pay a fine of Rs.5000/- in default S.I. for one month. For the offence under Section 506 of IPC, the appellant has been sentenced to R.I. for one year. The learned Judge directed that both the sentences to run concurrently.

3. The prosecution case briefly stated is as under:-

. The prosecutrix P.W.1 Kamal Narayan Lingchapa was residing at Kamathipura, Mumbai. She was residing there along with her mother. She was educated upto 6th standard. One Sudamati was her neighbour. The accused was residing at Antop Hill, Mumbai. The accused used to come to the house of Sudamati. He used to have his meals there. The appellant met the prosecutrix in the house of Sudamati. The appellant used to tell the prosecutrix that he would take her to his house for work and pay salary of Rs.1200/- per month.

However, her mother refused to send her. The accused was married and he had three children. His wife was not residing with him. When the mother of the prosecutrix had gone out of Mumbai, the prosecutrix had gone to the house of the appellant at Antop Hill, Mumbai for doing work. Thereafter, she came back. Thereafter, again the appellant called her to his house. Thereupon the prosecutrix told her mother that when she had gone to the house of the accused for three days, there was no problem, hence, she should be sent to the house of the appellant for work. However, even then her mother refused. Despite this, prosecutrix went to the house of the appellant for work in the month of April, 2000. She stayed at the house of the appellant from April to June, 2000. At that time, prosecutrix was about 14 years of age.

. There were two rooms in the house of the appellant. The appellant and his children used to sleep in the outer room and prosecutrix used to sleep in the inner room. However, one day, the appellant came into inner room and he raped prosecutrix. Prosecutrix requested him to leave her at her house at Kamathipura as she did not know

the way but the appellant did not do so. It is the case of the prosecutrix that the appellant threatened her to stay with him. The appellant repeated his act about 4 to 5 times during the period between April to June, 2000. In June, 2000 the appellant brought her to Kamathipura and left her there. About 2 to 3 months thereafter, the neighbours made enquiries with mother of the prosecutrix as her stomach had become big. Her mother P.W.2 Laxmi Lingachapa took her to the Doctor. The Doctor on checking the prosecutrix, found that she was pregnant.

. P.W.3 Kalpana Mistry was working with the Prerna Institution at Kamathipura. She felt that the prosecutrix was in difficulty and she needed help. Hence, the prosecutrix came to be admitted to Asha Sadan at Dongri. Immediately thereafter, the prosecutrix was produced before the Juvenile Court. Her statement was recorded before the Juvenile Welfare Board wherein, prosecutrix Kamal stated about the act done by the accused. Her statement was recorded by the Chairperson of the Welfare Board i.e. by P.W.5 Smt.Parmar. Thereafter, a letter was sent on behalf of Prerana Institution to

Nagpada Police Station. Thereafter, the statement of prosecutrix was recorded by the police. Thereafter, investigation commenced. Appellant came to be arrested. After completion of investigation, the charge sheet came to be filed. In due course, the case was committed to the Court of Sessions for trial.

4. The charge came to be framed against the appellant-original accused under Sections 376 and 506(II) of IPC. The accused pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

5. I have heard Mr.Murtaza Najmi, the learned advocate appointed on behalf of the appellant and Mr.A.S.Shitole, the learned A.P.P. for the State. I have perused the judgment and order as well as the evidence led in this case. After carefully considering the matter, I am of the opinion that the learned Sessions Judge has rightly convicted

the appellant.

6. The conviction of the appellant is mainly based on the evidence of the prosecutrix P.W.1 Kamal. It has come on record that the prosecutrix was about 14 years of age at the time of the incident and she has clearly stated that the appellant committed rape on her. The prosecutrix has stated this fact not only before the police which is treated as F.I.R. (Exhibit-6) but she has also said so in her statement to P.W.5 Smt.Parmar who is the chair person of the Juvenile Welfare Board. Nothing has been elicited in the cross examination of the prosecutrix or P.W.5 Smt.Parmar so as to disbelieve their testimony.

7. Mr.Murtaza Najmi, the learned advocate for the appellant has submitted that the appellant has been falsely implicated in the present case by the prosecutrix. He has submitted that there is huge delay in lodging the complaint. After the prosecutrix was allegedly raped by the appellant, she has not disclosed about the incident to anyone. He has stated that the delay in lodging the F.I.R. shakes the very foundation of the prosecution case

and on account of this, the entire edifice of the prosecution case would fall. Mr.Najmi has further pointed out that the prosecutrix has not lodged the complaint till she was almost seven months pregnant.

8. As far as the aspect of delay is concerned, delay in cases of rape is viewed in an entirely different manner than the delay in other cases. The Supreme Court in various cases including **State of Punjab Vs. Ramdev Singh (2004) 1 S.C.C. 421 and State of H.P. Vs. Shree Kant Shekari;** has observed that in cases of rape, mere delay in lodging FIR cannot be a ground by itself for throwing the entire case overboard. In fact, in the case of Shree Kant Shekari (supra), there was delay of six months in ldoging FIR. Invariably in cases of rape, there is delay in lodging the F.I.R. The reasons for delay are various and in a case of rape, the prosecution case cannot be said to be suspect only on the ground of delay in lodging the F.I.R. Moreover, the learned A.P.P. has pointed out that the mother of the prosecutrix is an illiterate lady so also the prosecutrix was educated only upto 5th standard, the prosecutrix

and her mother were residing in a temporary hut on the roadside in Kamathipura. They had no other relatives except brother of Kamal who had expired. The brother of Kamal used to beg for a living. The prosecutrix and her mother were poor and illiterate. They were residing on the roadside in a temporary hut. They had no support or any other responsible person who could have guided them. The learned A.P.P. submitted that looking to these facts, the delay canot be said to be fatal. I find much merit in this submission.

9. In respect of delay, P.W.2 Laxmi who is the mother of the prosecutrix, has stated that she had gone to Nagpada Police Station that is the police station under whose jurisdiction Kamathipura is situated. However, the police at Nagpada refused to register the complaint and asked her to go to Antop Hill police station i.e. where the offence had actually occurred. Thereafter she did not make any complaint in writing anywhere. It is seen that Laxmi is an illiterate lady who is residing in a temporary hut in Kamathipura. Looking to the educational and financial background and other circumstances of Laxmi and the prosecutrix, it

cannot be said that the delay in lodging complaint would fatally affect the prosecution case. It is pertinent to note that accused had not stated anywhere the reason as to why the prosecutrix would want to falsely implicate him.

10. Thereafter, Mr.Najmi submitted that no test identification parade was held and hence, the identification of the accused, cannot be relied upon. As far as this aspect is concerned, it has come in the evidence of prosecutrix that the appellant was known to her prior to the incident. The prosecutrix had met the appellant on many occasions. She had stayed at the house of the appellant for a few months, hence, it cannot be said to be a case of the accused being an unknown person. In such case, holding of test identification parade was not at all necessary.

11. Thereafter, Mr.Najmi submitted that the identification by the prosecutrix of the appellant in the Court also cannot be relied upon because on 14.3.2002 when the examination in chief of the prosecutrix was going on, the prosecutrix was asked whether she would be able to identify the accused.

At that time, the prosecutrix replied that she knows the accused and he was present in the Court on 22.2.2002. If one peruses the Roznama of 22.2.2002, it is seen that the appellant was indeed present in Court on that day as he was produced from jail custody. However, on 14.3.2002, the appellant had not been produced before the Court. Mr.Najmi further submitted that this cannot be said to be the proper identification of the appellant by the prosecutrix. In the present case, it is seen that prosecutrix has referred to the appellant by name i.e. "Umesh Shelar". Moreover, P.W.2 Laxmi who is mother of the prosecutrix, has identified the appellant in Court. She also knew the appellant prior to the incident as she had met him on many occasions. Thus, in the present case, it cannot be said that there is any confusion in respect of the identity of the appellant.

12. Thereafter, Mr.Najmi, submitted that the present case is totally dependent on the evidence of the prosecutrix. He has submitted that in the present case, the prosecutrix has consented to sexual intercourse which is borne out by the evidence. He has submitted that in view of the

fact that prosecutrix consented, she would be accomplice and hence, her evidence requires corroboration. He has submitted that there is no corroboration to the evidence of the prosecutrix in the present case. In support of his contention, he has placed reliance on the decision of the Supreme Court in the case of **Ramesher Kalyansingh Vs. State of Rajasthan, reported in A.I.R.(39) 1952 S.C.54.** However, on perusal of the said judgment, I find that the decision in fact does not support the appellant. In the said judgment, it is stated that "a woman who has been raped, is not an accomplice. If she was ravished, she is the victim of an outrage". It is further stated therein that "in the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned". It is thus observed in the said judgment in para 19 that "the tender age of the child coupled with other circumstances appearing in the case, such, for example, as the demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case". It is further observed in the said paragraph that "there is no role of practice that there must, in every case, be

corroboration before a conviction can be allowed to stand". Thus, this judgment is of no help to the appellant.

. As far as the above aspect is concerned, there is catena of judgments in the case of "rape" that the evidence of prosecutrix does not require corroboration. One of the Judgements is **Bharwada Bhojinbhai Hirjibhai Vs. State of Gujarat- A.I.R. 1983 S.C. 753.** Thus, I find no merit in the submission made by the learned advocate for the appellant.

13. Mr.Najmi, the learned advocate for the appellant further submitted that it is the case of the prosecutrix that she was staying with the appellant from April to June, 2000. She has stated that she has delivered a baby in December 2000. The learned advocate submitted that if we go by the last menstrual period as calculated by the ultra sound method, the prosecutrix could not have got pregnant in the middle of April, 2000 as is the case of the prosecutrix. However, as far as the ultra sound method and other medical tests of similar nature are concerned, these tests cannot be

said to be exact and these tests are approximate. Hence, in my view, nothing much would turn on this aspect.

14. Mr.Najmi further submitted that in order to ascertain truth of the case, DNA test ought to have been conducted. However, as observed earlier by me, the evidence of prosecutrix is sufficient to uphold the conviction and no further additional evidence is necessary in any form to uphold the conviction of the appellant.

15. Lastly, it is submitted by the learned advocate for the appellant that it is a clear case of consent which could be seen from the fact that though the prosecutrix has stated that the appellant had committed rape on her in the month of April, 2000 she continued to reside in his house upto June, 2000. In fact, the prosecutrix had gone to the house of the appellant against the wishes of her mother. Mr.Najmi submitted that the house of the appellant consists only of two rooms. The appellant was living in the house with his three children. There was no door in between the two rooms. The house of the appellant was made of

'tin-sheets'. The prosecutrix used to sleep in the inner room, the wall behind the cot where the prosecutrix used to sleep was of tin-sheet and behind the said wall of tin-sheet there was a room wherein a lady was residing with her family consisting of two daughters and other family members. It has come in the evidence of the prosecutrix that during the period from April to June 2000 the accused was going for work and during this period, the prosecutrix used to play with his children and the eldest child was as old as the prosecutrix. The second child was about 10 years of age and third child was some years younger. It has also come in the evidence that whenever the accused used to go out of the house, the prosecutrix used to talk with the neighbours and she became well acquainted with the neighbours. One of the neighbours had two daughters and she used to talk with these two girls. Their house was adjoining the house of the appellant and infact, it was separated only by one tin-sheet. Mr.Najmi submitted that if it had not been a case of consent, the prosecutrix would have certainly raised shouts and put up some resistance and as her bed was against the tin sheets on the other side of

which a family resided, they would have heard the noise and would have come to the rescue of the prosecutrix. He further submitted that if it was not a case of consent, the prosecutrix would have made an attempt to run away at the first opportunity that the appellant left the house to go to work. However, during the period from April to June, 2000, the prosecutrix did not seek help or make any complaint to the neighbours or to any other person nor did she try to run away. So also there is no material that the prosecutrix had put up any resistance. Hence, he has submitted that this is a clear case of consent.

16. No doubt, the evidence on record clearly shows that there was consent on the part of the prosecutrix, however, the prosecutrix was about fourteen and half years old at the time of the incident. Thus, she was below the age of 16 years, hence, even though she consented, the offence of rape is clearly made out against the appellant. In this view of the matter, the learned Judge has rightly convicted the appellant for the offence under Section 376 of IPC. The evidence on record also shows that the appellant had threatened the

prosecutrix. However, after holding that it was a case of consent, I find that the evidence in respect of the offence under Section 506 of IPC does not appear to be very convincing. Hence, the conviction for the offence under section 506 of IPC is required to be set aside.

17. Mr.Najmi submitted that the appellant has undergone six years of imprisonment out of the seven years of imprisonment imposed on him under Section 376 of IPC. He has submitted that looking to the fact that it is a case of consent and that the appellant has undergone six years of imprisonment, he has submitted that the sentence of imprisonment may be reduced to the period undergone by the appellant. In support of his contention, he has placed reliance on a decision of this Court in **Bandu alias Chan Bigde Vs. State of Maharashtra reported in 2003 Cri.L.J. 1990.** In the said case also, the prosecutrix was about 14 years of age i.e. below the age of the consent. In the said case, the Court held that the possibility of consent could not be ruled out and in such case, sentence of imprisonment of seven years R.I. was reduced to four years R.I. Mr. Najmi submitted

that in the present case also the sentence may be reduced to the period undergone by the appellant. In view of the said decision and the facts of this case, I am inclined to take a similar view as the evidence on record in the present case clearly makes out a case of consent.

18. In the result, the appeal partly succeeds. The conviction of the appellant under Section 506 IPC is set aside. The conviction of the appellant under Section 376 of IPC is confirmed. The sentence of imprisonment of seven years for the offence under Section 376 of IPC is reduced to the period already undergone by the appellant. However, the fine amount of Rs.5,000/- and i/d sentence is maintained. On fine amount being paid, the appellant to be released forthwith if not required in any other case.

[SMT.V.K.TAHILRAMANI, J.]